

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION**

In re:	§	Chapter 11
	§	
TOOTIE PIE COMPANY, INC. D/B/A	§	Case No. 13-51808
TOOTIE GOURMET PIE CAFÉ	§	
	§	
Debtor	§	

**DEBTOR’S RESPONSE AND OBJECTION TO TCA GLOBAL CREDIT MASTER
FUND, LP’S AMENDED MOTION TO FILE DERIVATIVE LAWSUIT
ON BEHALF OF THE DEBTOR’S ESTATE**

TO THE HONORABLE UNITED STATES BANKRUPTCY JUDGE:

Tootie Pie Company, Inc. (“Debtor” or “Debtor-in-Possession”), the Debtor and Debtor-in-Possession in the above captioned case, hereby files this Debtor’s Response Objection to TCA Global Credit Master Fund, LP’s Amended Motion to File Derivative Lawsuit on Behalf of The Debtor’s Estate (the “Motion”) and in support of this Motion, the Debtor respectfully represents as follows:

RESPONSE

1. In numbered paragraph 1 of the Motion, Debtor admits that some of the directors claimed by TCA to have committed malfeasance currently control Debtor. Debtor denies the remainder of numbered paragraph 1 of the Motion.

2. Debtor admits numbered paragraph 2 of the Motion.

3. Debtor admits numbered paragraph 3 of the Motion.

4. Debtor admits numbered paragraph 4 of the Motion.

5. Debtor admits numbered paragraph 5 of the Motion.

6. Debtor admits numbered paragraph 6 of the Motion.

7. Debtor admits numbered paragraph 7 of the Motion.

8. Debtor contends that it may reject the obligation to repurchase the stock and pay rejection damages but otherwise admits numbered paragraph 8 of the Motion.

9. Debtor cannot admit or deny whether its response to the MSJ was due shortly before July 3, 2013, but otherwise admits numbered paragraph 9 of the Motion.

10. Debtor contends that it may reject the obligation to repurchase the stock and pay rejection damages but otherwise admits numbered paragraph 10 of the Motion.

11. Debtor admits numbered paragraph 11 of the Motion.

12. Debtor denies that it violated SEC rules in not having its books and records audited and denies that it was delinquent in its filings. Debtor denies it violated any covenant with TCA in that TCA was fully aware of the status of Debtor's financials and filings. Debtor admits the remainder of numbered paragraph 12 of the Motion.

13. Debtor admits certain kinds of defaults can trigger an 8k filing and denies the remainder of numbered paragraph 13 of the Motion.

14. Debtor admits it filed a 10Q on November 16, 2012. Debtor denies the remainder of numbered paragraph 14 of the Motion.

15. Debtor admits it filed a 10Q on February 15, 2013. Debtor denies the remainder of numbered paragraph 15 of the Motion.

16. Debtor denies numbered paragraph 16 of the Motion.

17. Debtor denies Don Merrill is on the board of directors or that he is a current officer of the company. Debtor admits that David Strolle, Cliff Rodgers, Dan Gostylo and Leslie Doss are the current board members for Debtor. Debtor admits that Leslie Doss was made president and CEO of the Debtor post filing. Debtor denies any of the for-mentioned are officers of the company other than Leslie Doss. Debtor admits that the persons who signs SEC filings

are responsible for their accuracy as provided for in SEC law. Debtor denies that it was the responsibility of any of the current board members to make, sign, or verify the Debtor's SEC filings. Debtor denies the remainder of numbered paragraph 17 of the Motion.

18. Debtor denies numbered paragraph 18 of the Motion.

19. Debtor denies numbered paragraph 19 of the Motion.

20. Debtor is currently investigating the claims in paragraph 20 and cannot admit or deny its accuracy.

21. In regard to numbered paragraph 21, Debtor admits TCA Global sent a copy of the Motion on June 29, 2013, at approximately 8pm and conferred with Debtor's counsel on that same day. Debtor further pleads that it is currently investigating TCA's claims and thus far finds no merit to the claims except possible claims against Don Merrill. Debtor denies the remainder of numbered paragraph 21 of the motion.

AFFIRMATIVE PLEADINGS

22. Debtor objects to the Motion because there are no colorable claims against the current board members, none of which signed the alleged SEC filings and none of which were responsible for or charged with preparing any SEC filings or insuring their accuracy. Debtor further pleads that the claims brought by TCA are solely for the purpose of harassing the board into buying out TCA and would not serve the Debtor's estate, its creditors or the other equity holders. Debtor further pleads that Debtor has only been kept out chapter 7 bankruptcy through the goodwill of two of the current board members and current prosecution of these claims against the board of directors will send the Debtor into complete disarray, take away its most valuable funding source, and distract the management from accomplishing a reorganization plan to the detriment of the other creditors and equity holders.

23. Debtor further pleads that if TCA believes it has claims against the board members for fraud or misrepresentation, then it is within its right to bring a suit against those board members in its own name and outside the bankruptcy court. Debtor pleads that the requested derivative action is a subterfuge to attempt to drain resources from Debtor rather than for TCA to expend its own resources on its alleged claims. Debtor further pleads that if TCA brings suit against the board members and the board members successfully defend the suit, Debtor will be responsible for paying costs of the defense and such cost will be substantial and will likely prevent the company from being able to reorganize. Debtor further pleads that TCA has already demanded its shares be purchased back from the Debtor and if Debtor elects to purchase back the shares, TCA will no longer be a shareholder and have capacity to bring the suit. Debtor contends the filing of any suit should be delayed for at least 120 days to see if TCA will continue to have capacity to bring such suit.

24. Debtor further pleads that if the Court permits TCA to bring suit against the directors, then the Court should order such suit be brought on a complete contingency fee basis so that the estate is not burdened with litigation that does not create a net benefit to the estate.

25. Debtor further pleads that the Court should abate TCA's Motion and reset it for hearing in 120 days to allow the directors to function without the distraction of litigation.

PRAYER

WHEREFORE, Debtor respectfully requests that the Court Deny TCA's Motion and grant Debtor further relief that the Court finds it is justly entitled. In the alternative, Debtor requests the Court:

1. Abate TCA's request and set it for hearing 120 days from the date of the hearing on the Motion;

2. If a suit is authorized, Order the suit be brought on a contingency fee basis whereby the attorney who agrees to prosecute the case is paid 40% of any actual recovery for Debtor's estate after expenses are paid first from the recovery; and
3. Grant Debtor further relief that the Court finds it is justly entitled.

Dated: September 25, 2013

Respectfully submitted,

By: /s/ Ronald J. Smeberg
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served on September 25, 2013, electronically by the Court's PACER system and on all parties on the attached service list.

/s/ Ronald J. Smeberg
RONALD J. SMEBERG

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